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May 11, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: September 29, 2004

Case No.: TIA-0230

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Worker did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant

appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant was employed as a chemical coordinator, control room operator, and supervisor at DOE's Savannah River site (the site) for approximately thirty-six years, from 1953 to 1989. The Applicant filed an application with OWA, requesting physician panel review of six illnesses - skin cancer, actinic keratosis, pulmonary disease, cataracts, rosacea, and enlarged prostate.

The Physician Panel rendered a negative determination on each of the claimed illnesses. For the claimed skin cancer and actinic keratosis, the Panel determined that the illnesses were not caused by the Applicant's occupational exposures. The Panel stated that those conditions are overwhelmingly caused by sun exposure. For the claimed pulmonary disease, the Panel stated that while the Applicant was diagnosed with a pulmonary embolus, there is no evidence in the record of an occupational lung disease. For the claimed cataracts, the Panel stated that occupationally-induced cataracts occur primarily in response to intense exposure to radar, microwave, or infrared radiation. The Panel stated that there is no evidence in the Applicant's record of prolonged exposure to these types of radiation. For the claimed rosacea, the Panel stated that there is no evidence linking the illness to any of the Applicant's occupational exposures. For the claimed enlarged prostate, the Panel stated that the condition is very common in older men.

The OWA accepted the Physician Panel's negative determination and the Applicant filed the instant appeal. In his appeal, the Applicant contends that Panel was unknowledgeable about the procedures and working conditions at the site. The Applicant provides a detailed discussion of his toxic exposures during the course of his employment at DOE.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

The Applicant's appeal does not present a basis for finding Panel error. In making its determination, the Panel considered the Applicant's occupational exposures and determined that they were not a significant factor in his illnesses. Consequently, the Applicant's discussion of his occupational exposures represents a mere disagreement with the Panel's medical judgment, rather than an indication of Panel error.

As the foregoing indicates, the appeal does not provide a basis for finding Panel error and, therefore, should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0230 be, and hereby is, denied.
- (2) This denial pertains only to the DOE appeal and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 11, 2005